

June 21 2010

Ed Smith
CLERK OF THE SUPREME COURT
STATE OF MONTANA

Case No. OP-0268

IN THE SUPREME COURT OF THE
STATE OF MONTANA

JOHN E. LEWTON,

Defendant/Petitioner,

vs.

FILED

JUN 21 2010

Ed Smith
CLERK OF THE SUPREME COURT
STATE OF MONTANA
Respondent.

THE MONTANA TWELFTH JUDICIAL
DISTRICT COURT, CHOUTEAU COUNTY,
AND THE HONORABLE DAVID G. RICE,
PRESIDING JUDGE,

Motion for Reconsideration of Order Denying
Application for Writ of Supervisory Control

APPEARANCES:

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John E. Lewton

The Honorable David G. Rice
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I. APPLICATION FOR WRIT OF SUPERVISORY CONTROL

Defendant/Petitioner, John E. Lewton ("Lewton") petitions the Montana Supreme Court pursuant to M.R.App.20(1)(d), to reconsider its order of June 15, 2010, in which it denied Lewton's petition for a Writ of Supervisory Control and request to stay Lewton's criminal jury trial currently scheduled for June 28, 2010, in State of Montana v. John E. Lewton, Chouteau County District Court Cause No. DC-09-13. Clearly demonstrated exceptional circumstances in the form of violations of Lewton's constitutionally protected right to be free from consecutive prosecutions for offenses stemming from the same events. M.R.App. P. 20(1)(d).

The State of Montana prosecuted Lewton during a 5-day jury trial in the Jefferson County District Court, Cause No. DC-2009-26 in March 2010. The District Court instructed the jury that in order to prove that the bighorn sheep had been unlawfully killed, captured or taken, the evidence must show beyond a reasonable doubt that Lewton committed any of a series of eleven separate "predicate acts." The eleven numbered paragraphs below reflect the instructions provided to the jury in the Jefferson County prosecution. See Exhibit 12 (Jury Instruction No. 21) to Lewton's Application for Writ of Supervisory Control. The italicized paragraphs that follow each of the jury instructions quote the identical

2. MOTION FOR RECONSIDERATION OF ORDER DENYING APPLICATION FOR WRIT OF SUPERVISORY CONTROL.

allegations contained in the State's Information in the pending Chouteau County prosecution. See Exhibit 2 to Lewton's Application for Writ of Supervisory Control. The State's Information in the Jefferson County prosecution contained allegations identical to those contained in the Chouteau County Information. See Exhibit 3 to Lewton's Application for Writ of Supervisory Control.

1. That on or about September 17, 2008, the Defendant, purposely or knowingly hunted on the private property of Catherine Brewer, located in Chouteau County, Montana, without prior permission of the landowner.

Count 1: Hunting Without Landowner Permission, a misdemeanor, as specified in Mont. Code Ann. Sec. 87-3-304: On or about September 17, 2008, the Defendant hunted on the private property of George Laulo, Catherine Brewer, and/or William Brown without permission of the landowner, lessee, or their agent;

2. That on or about September 18, 2008, the Defendant, purposely or knowingly hunted on the private property of Catherine Brewer, located in Chouteau County, Montana, without prior permission of the landowner.

Count 2: Hunting Without Landowner Permission, a misdemeanor, as specified in Mont. Code Ann. Sec. 87-3-304: On or about September 18, 2008, the Defendant hunted on the private property of George Laulo, and/or Catherine Brewer without permission of the landowner, lessee, or their agent;

3. That on or about September 17, 2008, the Defendant, purposely or knowingly hunted on the private property of William Brown, located in Chouteau County, Montana, without prior permission of the landowner.

Count 1: Hunting Without Landowner Permission, a misdemeanor, as specified in Mont. Code Ann. Sec. 87-3-304: On or about September 17, 2008, the Defendant hunted on the private property of George Laulo, Catherine Brewer, and/or William Brown without permission of the landowner, lessee, or their agent;

3. MOTION FOR RECONSIDERATION OF ORDER DENYING APPLICATION FOR WRIT OF SUPERVISORY CONTROL.

4. That on or about September 17, 2008, the Defendant, purposely or knowingly operated a motorized-driven vehicle while hunting off of a legal route on public land located in Chouteau County, Montana.

Count 3: Unlawful Possession of Game Animal, a felony, as specified in Mont. Code Ann. Sec. 87-3-111: On or about September 18, 2008, the Defendant purposely or knowingly, possessed or transported all or part of an unlawfully killed or taken game animal, to-wit: a bighorn sheep. The animal was killed and/or transported in violation of Mont. Code Ann. Sec. 87-1-125 (Montana Fish, Wildlife and Parks Commission regulations [prohibiting] the use of motor vehicle off legal routes on public land).

5. That on or about September 18, 2008, the Defendant, purposely or knowingly operated a motorized-driven vehicle while hunting off of a legal route on public land located in Chouteau County, Montana.

Count 3: Unlawful Possession of Game Animal, a felony, as specified in Mont. Code Ann. Sec. 87-3-111: On or about September 18, 2008, the Defendant purposely or knowingly, possessed or transported all or part of an unlawfully killed or taken game animal, to-wit: a bighorn sheep. The animal was killed and/or transported in violation of Mont. Code Ann. Sec. 87-1-125 (Montana Fish, Wildlife and Parks Commission regulations [prohibiting] the use of motor vehicle off legal routes on public land).

6. That on or about September 17, 2008, the Defendant, purposely or knowingly operated a motorized-driven vehicle while on the private property of George Laulo, located in Chouteau County, Montana, without the landowner's permission.

Count 3: Unlawful Possession of Game Animal, a felony, as specified in Mont. Code Ann. Sec. 87-3-111: On or about September 18, 2008, the Defendant purposely or knowingly, possessed or transported all or part of an unlawfully killed or taken game animal, to-wit: a bighorn sheep. The animal was killed and/or transported in violation of Mont. Code Ann. Sec. 87-3-125 (Montana Fish, Wildlife and Parks Commission regulations [prohibiting] the use of motor vehicle where a landowner has not granted permission for such use).

4. MOTION FOR RECONSIDERATION OF ORDER DENYING APPLICATION FOR WRIT OF SUPERVISORY CONTROL.

7. That on or about September 18, 2008, the Defendant, purposely or knowingly operated a motorized-driven vehicle while hunting on the private property of George Laulo, located in Chouteau County, Montana, without the landowner's permission.

Count 3: Unlawful Possession of Game Animal, a felony, as specified in Mont. Code Ann. Sec. 87-3-111: On or about September 18, 2008, the Defendant purposely or knowingly, possessed or transported all or part of an unlawfully killed or taken game animal, to-wit: a bighorn sheep. The animal was killed and/or transported in violation of Mont. Code Ann. Sec. 87-3-125 (Montana Fish, Wildlife and Parks Commission regulations [prohibiting] the use of motor vehicle where a landowner has not granted permission for such use).

8. That on or about September 17, 2008, the Defendant, purposely or knowingly operated a motorized-driven vehicle while hunting on the private property of Catherine Brewer, located in Chouteau County, Montana, without the landowner's permission.

Count 3: Unlawful Possession of Game Animal, a felony, as specified in Mont. Code Ann. Sec. 87-3-111: On or about September 18, 2008, the Defendant purposely or knowingly, possessed or transported all or part of an unlawfully killed or taken game animal, to-wit: a bighorn sheep. The animal was killed and/or transported in violation of Mont. Code Ann. Sec. 87-3-125 (Montana Fish, Wildlife and Parks Commission regulations [prohibiting] the use of motor vehicle where a landowner has not granted permission for such use).

9. That on or about September 18, 2008, the Defendant, purposely or knowingly operated a motorized-driven vehicle while hunting on the private property of Catherin Brewer, located in Chouteau County, Montana, without the landowner's permission.

Count 3: Unlawful Possession of Game Animal, a felony, as specified in Mont. Code Ann. Sec. 87-3-111: On or about September 18, 2008, the Defendant purposely or knowingly, possessed or transported all or part of an unlawfully killed or taken game animal, to-wit: a bighorn sheep. The animal was killed and/or transported in violation of Mont. Code Ann. Sec. 87-3-125 (Montana Fish, Wildlife and Parks Commission regulations [prohibiting] the use of motor vehicle where a landowner has not granted permission for such use).

5. MOTION FOR RECONSIDERATION OF ORDER DENYING APPLICATION FOR WRIT OF SUPERVISORY CONTROL.

10. That on or about September 17, 2008, the Defendant, purposely or knowingly used two-way communication to hunt a game animal in Chouteau County, Montana.

Count 3: Unlawful Possession of Game Animal, a felony, as specified in Mont. Code Ann. Sec. 87-3-111: On or about September 18, 2008, the Defendant purposely or knowingly, possessed or transported all or part of an unlawfully killed or taken game animal, to-wit: a bighorn sheep. The animal was killed and/or transported in violation of Mont. Code Ann. Sec. 87-1-125 (Montana Fish, Wildlife and Parks Commission regulations [prohibiting] two-way communication while hunting).

11. That on or about September 18, 2008, the Defendant, purposely or knowingly used two-way communication to hunt a game animal in Chouteau, Montana.

Count 3: Unlawful Possession of Game Animal, a felony, as specified in Mont. Code Ann. Sec. 87-3-111: On or about September 18, 2008, the Defendant purposely or knowingly, possessed or transported all or part of an unlawfully killed or taken game animal, to-wit: a bighorn sheep. The animal was killed and/or transported in violation of Mont. Code Ann. Sec. 87-1-125 (Montana Fish, Wildlife and Parks Commission regulations [prohibiting] two-way communication while hunting).

In the Jefferson County prosecution Lewton did not contest the fact that he purchased the head and horns of the bighorn sheep from Gibson for \$5,000.00 and an agreement to "cast" a set of the horns for Gibson. Lewton also did not contest the fact that he purchased the head and horns purposely or knowingly. In fact, Lewton demanded a receipt to document the purchase that included the tag number and plug number. See Exhibits 4, 5, 6, and 7 to Lewton's Application for Writ of Supervisory Control. Lewton did contest, however, the allegation that the bighorn

6. MOTION FOR RECONSIDERATION OF ORDER DENYING APPLICATION FOR WRIT OF SUPERVISORY CONTROL.

sheep had been illegally taken or killed. The Jefferson County jury found Lewton not guilty of unlawful sale of a game animal on March 24, 2010. See Exhibit 13 to Lewton's Application for Writ of Supervisory Control.

The State now seeks to prosecute Lewton in Chouteau County for the same alleged illegal taking/killing of the same bighorn sheep. The allegations in the State's Information in Chouteau County mirror the allegations in the Information in the Jefferson County prosecution regarding the underlying facts. The District Court in Jefferson County instructed the jury that it had to agree that Lewton had committed at least one of these "predicate acts" of illegal taking/killing of a bighorn sheep in order to convict Lewton on the charge of sale of an unlawfully taken/killed game animal. The Jefferson County jury, of course, disagreed with the State that Lewton had committed any of the "predicate acts" that form the basis of the State's charges in the Chouteau County prosecution.

Lewton successfully defended himself in the Jefferson County prosecution against the allegations by the State that he had committed any of the eleven "predicate acts" that form the basis of the State's charges in the Chouteau County prosecution. Double jeopardy prohibits the State's attempt to force Lewton to defend himself a second time against the State's allegations that he committed any of these eleven predicate acts. As the United States Supreme Court powerfully

7. **MOTION FOR RECONSIDERATION OF ORDER DENYING APPLICATION FOR WRIT OF SUPERVISORY CONTROL.**

exhorted, the "State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense." United States v. Dinitz, 424 U.S. 600, 606, 96 S.Ct. 1075, 1079, 47 L.Ed.2d 267 (1976) (quoting Green v. United States, 355 U.S. 184, 187-88, 78 S.Ct 221, 223, 2L.Ed.2d 199 (1957)). The Court explained that the second prosecution subjects a defendant "to embarrassment, expense and ordeal," and further compels the defendant "to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty."

The Jefferson County jury found that Lewton had not committed any of the eleven "predicate acts" that form the basis of the State's charges in the Chouteau County prosecution. The State nevertheless presses ahead with its second prosecution of Lewton, thereby subjecting Lewton "to embarrassment, expense and ordeal." The State's second prosecution of Lewton on these same "predicate acts" further compels Lewton "to live in a continuing state of anxiety and insecurity." The State's second prosecution of Lewton enhances the possibility that Lewton may be found guilty even though a separate jury of his peers in Jefferson County already found him to be innocent of having committed even one of these "predicate acts."

8. MOTION FOR RECONSIDERATION OF ORDER DENYING APPLICATION FOR WRIT OF SUPERVISORY CONTROL.

Finally, the State's second prosecution of Lewton on these same predicate acts in Chouteau County raises the specter of "triple jeopardy." By the State's reasoning, an acquittal by the jury regarding these "predicate acts" in Chouteau County would not foreclose a third trial of Lewton on these same "predicate acts" in a third prosecution in Blaine County Justice Court. As noted in the Lewton's Application for Writ of Supervisory Control, he faces prosecution in Blaine County on several of these same "predicate acts." Enough is enough.

The State seems unfazed by this prospect, however, as evidenced by its recent motion in limine in the Chouteau County prosecution to limit reference to the Jefferson County prosecution. See State's Motion in Limine, attached hereto as Exhibit A. The State's wish to start with a clean slate ignores its own dubious decisions to charge Lewton in multiple counties with multiple offenses arising from the same set of events. Nothing prevents the State from splitting the charges, but the State must face the consequences when its charging decisions go awry. The jury of Lewton's peers in Jefferson County rejected the State's evidence. This Court, too, should reject the State's attempt for a "legal Mulligan."

II. CONCLUSION

Time still remains for this Court to prevent this continuing injustice to Lewton. The Clerk of the District Court for Chouteau County has informed the undersigned

that jury summonses for the June 28, 2010, trial in Chouteau County will not be mailed until 5:00 p.m. on Monday, June 21, 2010. Lewton asks the Court to issue an immediate stay of the trial, reconsider its order of June 15, 2010, and, if necessary, grant oral argument in this matter. The Double Jeopardy Clause of the U.S. Constitution and the Montana Constitution demand nothing less.

DATED: June 21, 2010.

JARDINE & MORRIS, PLLC

By: 

Jack H. Morris

Attorney for Defendant/Petitioner

CERTIFICATE OF SERVICE

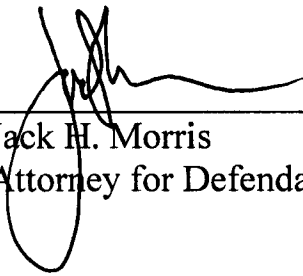
I hereby certify that a copy of the foregoing MOTION FOR RECONSIDERATION OF ORDER DENYING APPLICATION FOR WRIT OF SUPERVISORY CONTROL was served upon the following persons by the following means:

<u> x </u>	Hand Delivery
<u> </u>	Regular Mail
<u> </u>	Overnight Delivery Service
<u> x </u>	Fax
<u> </u>	E- Mail

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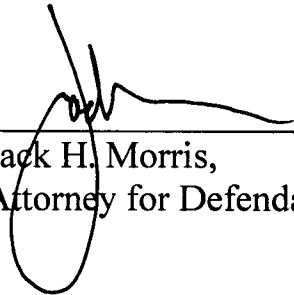
DATED: June 21, 2010.



Jack H. Morris
Attorney for Defendant/Petitioner

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4)(d) of the Montana Rules of Appellate Procedure, I certify that this Motion is printed with proportionately spaced Times New Roman text typeface of 14 points; is double spaced; and the word count calculated by Microsoft Office Word 2003 is 2,486 words, excluding certificate of service and certificate of compliance.



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6 COUNSEL FOR STATE

7
8 MONTANA TWELFTH JUDICIAL DISTRICT COURT, CHOUTEAU COUNTY

9 STATE OF MONTANA,

10 Plaintiff,

11 v.

12 JOHN E. LEWTON,

13 Defendant.

Cause No. DC -09-13

STATE'S MOTIONS
IN LIMINE

14 A. Regarding the Case of State v. John E. Lewton, Jefferson County
15 Cause No. DC-09-26

16 The State hereby moves this Court for an order limiting reference at trial to the
17 case of State v. John E. Lewton, Jefferson County Cause No. DC-09-26. As this Court
18 knows, the charge in the Jefferson County case was of sale of unlawfully-taken game
19 animal parts and the Defendant was acquitted by the jury. The facts of the Jefferson
20 County case generally are not relevant to this case; the outcome of the case is not
21 relevant.

22 Montana Rule of Evidence 401 provides:

23 **Definition of relevant evidence.** Relevant evidence means evidence having
24 any tendency to make the existence of any fact that is of consequence to the
25 determination of the action more probable or less probable than it would be
without the evidence. Relevant evidence may include evidence bearing upon
the credibility of a witness or hearsay declarant.

26 Montana Rule of Evidence 402 provides that: "[e]vidence which is not relevant is not
27 admissible." Montana Rule of Evidence 403 provides:

EXHIBIT

A

STATE'S MOTIONS IN

1 **Exclusion of relevant evidence on grounds of prejudice, confusion, or**
2 **waste of time.** Although relevant, evidence may be excluded if its
3 probative value is substantially outweighed by the danger of unfair
4 prejudice, confusion of the issues, or misleading the jury, or by
5 considerations of undue delay, waste of time, or needless presentation of
6 cumulative evidence.

7 Testimony regarding the Jefferson County case and the Defendant's claims
8 asserted therein would have no probative value regarding the factual claims related to
9 guilt or innocence of the Defendant in this case. If deemed relevant, the State must be
10 allowed to respond to references to the Jefferson County trial to explain to the jury the
11 acquittal. Such evidence would confuse the jury, mislead the jury, and would be
12 time-consuming for everyone.

13 Given the testimony by the same witnesses to certain relevant acts, there exists a
14 great possibility that testimony in the Jefferson County trial will be relevant. For
15 purposes of establishing prior inconsistent statements, reference to prior testimony should
16 be without reference to the specific case. Similarly, rebuttal evidence in the form of prior
17 testimony should be allowed when deemed relevant.

18 **B. Reference to the Irrelevant Circumstances Surrounding the General**
19 **Practices of the Montana Department of Fish, Wildlife, and Parks.**

20 There has been no allegation in this case that any employee or agent of the State of
21 Montana acted to support a claim of outrageous government conduct or similar claim. Such
22 claims are legal claims and not related to the factfinder's task at trial of determining guilt or
23 innocence. But, given the prior assertions by this Defendant that there was something
24 improper in the decision to conduct an undercover investigation of him or in the decision to
25 allow the undercover warden to shoot a bighorn ram, and the Defendant's current list of
26 witnesses and exhibits, the State hereby requests an order limiting reference at trial to facts
27 that are arguably supportive of such claims, but irrelevant to the alleged offenses.

Such assertions and claims should have been raised pretrial for legal consideration
by this Court. They should be disallowed at trial to the extent that the facts are irrelevant to

1 a trial of factual issues at trial. They also should be disallowed to the extent they confuse or
2 mislead the jury or result in a waste of trial time.

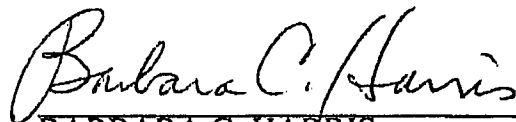
3 **C. Reference to Penalties**

4 Punishment is not the concern of a jury, whose sole function is to determine guilt
5 or innocence. State v. Sanchez, 2008 MT 27, ¶ 61, 341 Mont. 240, 177 P.3d 444; State v.
6 Brodniak, 221 Mont. 212, 226-27, 718 P.2d 322, 332 (1986), overruled on other grounds
7 by State v. Van Kirk, 2001 MT 184, 306 Mont. 215, 32 P.3d 735. Therefore, it is not
8 proper for parties to make any reference to punishment or to characterizations of
9 "misdemeanor" or "felony." The State seeks an order prohibiting any such references.

10 **D. Testimony Regarding State's Charging Decisions**

11 It is possible that the Defendant will offer evidence regarding decisions by the
12 State relating to the Defendant's cases filed in other jurisdictions. Such evidence would
13 not be relevant pursuant to Mont. R. Evid. 401, and should not be allowed. If allowed,
14 response by the State must be allowed.


15 Dated this 14th day of June, 2010.

16 
17 BARBARA C. HARRIS
18 Assistant Attorney General
19

20 **CERTIFICATE OF SERVICE**

21 I hereby certify that I caused a true and correct copy of the foregoing State's
22 Motions in Limine to be mailed, first class postage prepaid, to:

23 Mr. Jack Morris
24 Attorney at Law
25 P.O. Box 488
Whitehall, MT 59759-0488

26 Dated: 6-14-10 
27